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No. 82-6284

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

LINWOOD E. BRILEY,

Petitioner,

v.

J. P. MITCHELL, SUPERINTENDENT,

Respondent.

BRIEF IN OPPOSITION TO CERTIORARI

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ARGUMENT AGAINST GRANTING CERTIORARI

I. The Questions Presented Are Not Properly Before This Court.

As Petitioner concedes (Petition, P. 5), the questions presented were not addressed by the Virginia Supreme Court on direct appeal. See Briley v. Commonwealth, 221 Va. 532, 273 S.E.2d 48 (1980). The Virginia Supreme Court adheres to a contemporaneous objection rule, and will not notice any error not objected to at trial and assigned as error on appeal. Rule 5:21, Rules of the S preme Court of Virginia. There can be no doubt that the questions presented in this petition were not raised at trial nor on direct appeal, and Petitioner does not contend otherwise.

When Petitioner filed his petition for a writ of habeas corpus in the state court, he raised these issues for the first time. Under Virginia law, an issue which could have been raised at trial and on appeal cannot be recognized in a petition for a writ of habeas corpus. Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974).

The order of the state habeas court entered on December 15, 1981 (Petition Appendix, pp. 8,9) would make it appear that the habeas court would entertain the questions presented. At the beginning of the plenary hearing, however, the Respondent requested the habeas court to reconsider its ruling and deny

those claims, including those presented in the present petition. which were not objected to at trial and not raised on direct appeal. The habeas court indicated that such issues could be raised only within the broad claim of ineffective assistance of counsel. (Habeas transcript of December 15, 1981, pp. 4-7 included in Appendix pp. 1-4). Respondent asserts that the habeas court did in fact refuse to entertain the questions now presented for the reason they had not been raised at the original trial and on direct appeal.

Furthermore, on appeal from the denial of the petition for a writ of habeas corpus, Petitioner did not raise these issues. Petitioner first raised these questions presented on a Petition for Rehearing. The Virginia Supreme Court will not consider issues raised for the first time on a Petition for Rehearing since such issues were not assigned as error. See Rule 5:21.

It is axiomatic that this Court will not consider issues which have not been decided by the highest court of the state. Cardinale v. Louisiana, 394 U.S. 437 (1969).

II. The Jury Was Unequivocally Unanimous In Finding Both Aggravating Circumstances.

In instructing the jury at the penalty phase of the bifurcated proceeding, the trial court advised the jury that the Commonwealth must prove beyond a reasonable doubt at least one of the two statutory aggravating circumstances. The trial court observed that while part of the jury may believe one and part may believe the other aggravating circumstance, the jury had to be unanimous in finding an aggravated circumstance (Appendix p. 5). When the jury returned its verdict, the jury had found both of the aggravating circumstances, and upon polling the jury, they indicated the verdict was unanimous (Appendix p. 6-9).

In addition the trial court specifically made inquiry of the jury as to the finding of aggravating circumstances. The jury unequivocally stated that it had been unanimous in finding both aggravating circumstances (Appendix p. 9).

To maintain that an ambiguity exists concerning whether the jury was unanimous in finding both aggravating circumstances is to ignore the record.

Petitioner's reliance upon Godfrey v. Georgia, 446 U.S. 420 (1980), is misplaced. The victims in Godfrey were killed instantly whereas in the present case Petitioner's victim was forced to experience the horror of waiting for his execution. See James Briley v. Commonwealth, 221 Va. 563, 273 S.E.2d 57 (1980). Additionally, the Virginia Supreme Court has limited the scope of the "vileness" aggravating circumstance, see Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978), and has consistently applied its criteria when reviewing the record to determine that the evidence supported a finding of the aggravating circumstance.

CONCLUSION

For the reasons stated, the Respondent submits that the Petition for Certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, James E. Kulp, a member of the Bar of the United States Supreme Court, do certify that on March 24, 1982, I caused this Brief In Opposition to be deposited in the United States Post Office or mailbox, first class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, pursuant to Rule 28.2.

I further certify that a copy of this Brief In Opposition was mailed, first class postage prepaid, to Deborah C. Wyatt, Esquire, 917 East Jefferson Street, Charlottesville, Virginia 22901, counsel for Petitioner.

James E. Kulp
Senior Assistant Attornye General

COMMONWEALTH OF VIRGINIA,

CITY OF RICHMOND, to-wit:

The foregoing certificate was subscribed and sworn to before me by James E. Kulp this 24th day of March, 1983.

My commission expires: March 25, 1985

Marian N. Schumpf
Notary Public

at the bottom where it actually says, Claim V all paragraphs. I believe it should be, Claim VI for Number 6.

THE COURT: Okay.

MR. KULP: If it please the Court, on that order that the Court is looking at, setting out the claims that the Court has ruled on, I would ask the Court -- I think the order sets forth precisely what the Court said on November 18, and I have endorsed the order. I would ask the Court to reconsider some of the allegations based on the pleading filed by the respondent, based on the case of Slayton versus Parrigan, 215 Va., where the Supreme Court of Virginia has made it clear from reading Number 29 of the opinion which says that the petitioner for the writ of the habeas may not plead for suit of appeal or writ of error. In that case, the court held that since the issue of identification could have been raised at the trial and on appeal, that it could not, the petitioner did not have standing to raise that on petition or a writ of habeas corpus. I filed that in answer to a number of the claims, Paragraph 13, Subparagraphs D and E, Paragraph 14, A, B, E, F, G, H, and I, Paragraph 15, A, B, C, D, E, G, H, L, M, N, O, P, Q, R, S, T --

THE COURT: Where are you reading?

MR. KULP: These are the paragraphs.

THE COURT: What paper are you reading from?

MR. KULP: That is just a little note that I made, Your Honor.

THE COURT: What order are you reading this note from?

MR. KULP: The order is the one on the top where it says, on November 18, 1981, came the respondent, and it sets out a number of different paragraphs and rulings.

THE COURT: Is that the order on top?

MR. KULP: Yes, sir.

THE COURT: And, in answer to that is the following, which shall be addressed by the Court, that the following shall be denied for the reasons having been decided by the Virginia Supreme Court on appeal from the trial decision: Claim 1, Paragraphs B and C; Claim 2, Paragraphs C, D, E, F, and G; Claim 3, Paragraphs A, F, G, I, J, K, L, M, N, O, P, Q, S, T. Is that right?

MR. KULP: Yes, sir.

THE COURT: And, it is further ordered that the following claims, Claims -- Claim 3,

Paragraphs B, E, and H; right?

MR. KULP: Yes, sir.

THE COURT: It is further ordered that Paragraph A of Claim 1 is denied on the merits. It is further ordered that Claim V does not extend to reflection, in effect, because of the failure which counsel raised this claim in the trial on appeal. It says, it is further ordered that Claim V -- Is that supposed to be Claim 6?

MRS. WYATT: Your Honor, I believe Mr. Kulp and I do agree to that, that it was supposed to be Claim 6.

THE COURT: If I change 6, I have got to handle --

MRS. WYATT: It is further ordered that Claim 3 is denied. That is addressing Claim 3, Claim V, and consequently at the bottom of the order where it says, Claim V, again that should have been -- that is a separate --

THE COURT: Oh, all paragraphs, Claim V is denied, except for reflection.

It looks like there are only two issues for me to decide.

MR. KULP: All I am asking the Court to do -- I think we understand and I think the order

correctly reflects what occurred. I am simply asking the Court to amend the order to reflect that the claims you see down at the bottom of the first page, Paragraphs D and E --

THE COURT: Yes.

MR. KULP: The respondent raised the issue in its pleading that those issues could have been raised at the trial on appeal and cannot be raised on the habeas corpus under Slayton versus Parrigan. I would ask the Court to make such a ruling on those various claims, that I would be willing to state for the record in addition to, you know, all the other rulings the Court has made.

THE COURT: Well, I think the only reason that would be admissible in evidence is the fact that in the broad claim of ineffective assistance --

MR. KULP: We are not contesting that, but the claims for --

THE COURT: We are not? Constitutionally, you cannot raise any habeas corpus --

MR. KULP: I want to make that clear for the record, so there will be no mistake when it goes someplace further.

THE COURT: Well, it is clear in my mind.

MR. KULP: We want to be clear for the

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hearing resumes, viz:

THE COURT: Good morning, members of the jury.

NOTE: The jury answers, good morning.

THE COURT: Members of the jury, (Reading) "You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to life imprisonment. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following two alternatives: --" Now, let me state to you: Of these two alternatives, part of you may believe one, part of you may believe another, but at least all twelve of you must believe one or the other.

(Reading) "First, that, after consideration of his past criminal record, there is a probability that he would commit acts of violence that would constitute a continuing serious threat to society; or, two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of

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(To the jury) Ladies and gentlemen, you will now go to your room on the penalty phase of this case. You will take with you the instructions of the Court and the exhibits.

You have a form of verdict attached -- forms of verdicts attached at the end of the instructions. Today there are only four instructions, so the fifth sheet here will be the verdict forms.

You will take these certified copies of the orders of the Circuit Court of the City of Richmond, Division I.

When you have reached a verdict, if you will knock at your door, one of the Deputy Sheriffs will be right outside to receive you.

THE SHERIFF: (To the jury) Come with me, please.

NOTE: At this point, 11:15 o'clock a.m., the jury go into the jury room. The jury knock at the door at 1:12 o'clock p.m. At 1:15 o'clock p.m., the Court and counsel being present, the jury return to the courtroom.

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict?

FOREMAN BIBB: Yes, Your Honor, we have

THE COURT: Is the verdict unanimous?

FOREMAN BIBB: Yes, sir.

THE COURT: So say you all?

NOTE: The jurors answer affirmatively.

THE COURT: Hand the verdict to the Sheriff.

NOTE: The jury foreman hands the verdict to the Sheriff who, in turn, hands same to the Court.

THE COURT: I again remind you that we will not tolerate any display of any sort.

(Reading the verdict) We the jury, on the issue joined, having found the defendant guilty of capital murder of John Harvey Gallaher during the commission of robbery, while armed with a deadly weapon and having found that, after consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society and his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind; aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder, and having considered the evidence in

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mitigation of the offense, unanimously fix his punishment at death. Signed: Charles L. Bibb, Foreman, dated 2-22-80.

Poll the jury, Mr. Clerk.

THE CLERK: Ladies and gentlemen of the jury, if this be the verdict of each of you, please raise your right hand as your name is called.

Barbara B. Smith.

NOTE: Ms. Smith raises her hand.

THE CLERK: Hattie P. Burgess.

NOTE: Ms. Burgess raises her hand.

THE CLERK: Thomas Quarles.

NOTE: Mr. Quarles raises his hand.

THE CLERK: Herbert L. Pryor.

MR. PRYOR: Here. (Raising hand)

THE CLERK: Jasper Hunter, Sr.

NOTE: Mr. Hunter raises his hand.

THE CLERK: Charles L. Bibb.

NOTE: Mr. Bibb raises his hand.

THE CLERK: Lucille W. Mitchell.

NOTE: Ms. Mitchell raises her hand.

THE CLERK: Bessie W. Hargrove.

NOTE: Ms. Hargrove raises her hand.

THE CLERK: Anne E. Harris.

NOTE: Ms. Harris raises her hand.

THE CLERK: Mildred A. Andrews.

NOTE: Ms. Andrews raises her hand.

THE CLERK: Edward J. Davis, Sr.

NOTE: Mr. Davis raises his hand.

THE CLERK: Mabel Dunn.

NOTE: Ms. Dunn raises her hand.

THE COURT: All right. The record will show that from the polling of the jury, that they all indicated by raising their hand that it was unanimous.

And I noticed, Mr. Foreman, by striking out an "or" -- as between the two circumstances you must find, you struck out the word "or" which, I take it, to mean that you all not only were unanimous in the final verdict, but were unanimous in finding the two lawful provisions that you must find in order to impose a death sentence, is that correct?

FOREMAN BIBB: Yes, sir.

THE COURT: So say you all?

NOTE: The members of the jury answer affirmatively.

THE COURT: Ladies and gentlemen of the jury, the Court wishes to -- I never condemn and I never criticize a jury, but I do wish to tell you